

The issues before the Board on this appeal are:

1. Whether claimant suffered an accidental injury.
2. If an accidental injury occurred, did it arise out of and in the course of the employee's employment.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record compiled to date and considering the parties' arguments, the undersigned Board Member finds and concludes:

This is an appeal from a preliminary hearing order. The Board has jurisdiction to review decisions from a preliminary hearing in those cases where an administrative law judge has allegedly exceeded his or her jurisdiction.¹ In addition, K.S.A. 44-534a grants the Board jurisdiction to consider the following issues in appeals from preliminary hearing orders:

- (1) Whether the employee suffered an accidental injury;
- (2) Whether the injury arose out of and in the course of the employee's employment;
- (3) Whether notice is given or claim timely made;
- (4) Whether certain defenses apply.

In this instance, the respondent argues that claimant failed to meet his burden of proof that he suffered an accidental injury that arose out of and in the course of his employment with respondent on March 6, 2009. The Board clearly has jurisdiction to address that issue. However, the Board does not have jurisdiction to review the independent medical evaluation orders entered by the Judge.

A claimant in a workers compensation proceeding has the burden of proof to establish by a preponderance of the credible evidence the right to an award of compensation and to prove the various conditions on which his or her right depends.²

First, the respondent contends the claimant did not sustain a personal injury as defined by K.S.A. 2008 Supp. 44-508(e).

¹ K.S.A. 2008 Supp. 44-551(i)(2)(A).

² K.S.A. 2008 Supp. 44-501(a); *Perez v. IBP, Inc.*, 16 Kan. App. 2d 277, 826 P.2d 520 (1991).

“Personal injury” and “injury” mean any lesion or change in the physical structure of the body, causing damage or harm thereto, so that it gives way under the stress of the worker's usual labor. It is not essential that such lesion or change be of such character as to present external or visible signs of its existence.³

The respondent's argument is not persuasive. On March 6, 2009, while at work for the respondent, the claimant hit his head on a pallet rack that rendered him unconscious. Immediately after the accident he sought treatment for a scalp contusion and concussion at Lawrence Memorial Hospital on March 6, 2009. (P.H. Trans., Cl. Ex. 4.) Subsequent to March 6, 2009, the claimant experienced, among other symptoms, numbness in his arms and pain in his neck and back. The claimant has shown by the preponderance of the evidence that he sustained an injury as contemplated by K.S.A. 2008 Supp. 44-508(e).

The respondent also argues that the injury, if an injury occurred, did not arise out of and in the course of employment.

The two phrases arising “out of” and “in the course of” employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

The phrase “out of” employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises “out of” employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises “out of” employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase “in the course of” employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.⁴

Again the respondent's position is not persuasive. The record reflects that claimant, while at work on March 6, 2009, hit his head on a pallet rack. Claimant testified this rendered him unconscious. Upon being discovered by a co-worker, claimant was transported to the Lawrence Memorial Hospital emergency room by ambulance. Claimant was diagnosed with a scalp contusion and concussion. Although apparently no one saw the claimant hit his head, the claimant's explanation of the accident is reasonable and supported by the evidence.

³ K.S.A. 2008 Supp. 44-508(e).

⁴ *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 278, 899 P.2d 1058 (1995).

The record does not support the respondent's claim that claimant did not hit his head at work. The Judge, who heard and observed claimant's testimony, found the claimant credible and that he met his burden of proof.

In conclusion, the October 15, 2009, preliminary hearing Order is affirmed.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.⁵ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2008 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

WHEREFORE, the undersigned Board Member affirms the October 15, 2009, preliminary hearing Order entered by Judge Avery.

IT IS SO ORDERED.

Dated this ____ day of January, 2010.

CAROL L. FOREMAN
BOARD MEMBER

c: George H. Pearson, Attorney for Claimant
Kim J. Poirier, Attorney for Respondent and its Insurance Carrier
Brad E. Avery, Administrative Law Judge

⁵ K.S.A. 44-534a.